

AGGRESSIVE DEFENSE OF THE RULE OF LAW

Trump and his henchmen have declared war on the rule of law. Defending it will require aggressive responses. It's time for heavy use of Rule 11

Here are the relevant provisions of Rule 11:

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

snip

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation. ...

Every pleading from the government should be closely examined. If there are reasonable grounds, the affected parties should immediately demand preservation of records proving compliance with Rule 11(b).

Example: Illinois Sanctuary City laws

DoJ sued Illinois, Cook County, and Chicago over our sanctuary city laws and the policies adopted pursuant to them. (Full disclosure: I am a Chicagoan.) The suit claims that the laws were intended to and do interfere with the ability of the feds to enforce immigration laws. There is a lot of bluster about this, but there isn't a single specific example of active interference with the feds. There are no specific allegations of damage done by enactment or compliance with the laws and policies.

The complaint lays out the provisions of Chicago's policy in ¶¶ 41-50. Then:

51. Upon information and belief, Chicago law enforcement officials have been chilled by these prohibitions.

52. Upon information and belief, Chicago law enforcement officials are also confused by the restrictions on them and thus do not provide even the permissible cooperation out of fear of punishment.

The defendants should demand preservation of all records showing that the lawyers who filed this suit had cause to believe that there is evidentiary support for these allegations, or that it is likely that discovery would uncover evidentiary support.

But, even if there is such chilling or confusion, it doesn't prove the case alleged by the feds. For example, it is likely the case that the feds can seek clarification of the rules from the superior officers of the duty people. There is no allegation that any actual federal agent has been unable to obtain any result permitted by the law. That information is obviously available to the government's lawyers if it existed.

It appears that Chicago has a powerful defense against these claims under the anti-commandeering doctrine. Here's a report from the Congressional Research Service. It says that there are six district court opinions all holding in Chicago's favor. I haven't checked to see if there is later precedent (but this indicates there isn't any). If that's right, then a demand should be made for preservation of records regarding how and why this suit was filed. Was there an improper purpose, like a political purpose?

The demand should include any and all records at the Department of Justice in D.C., as well as documents in the possession or under the control of the US Attorney who filed the suit and all of the lawyers who signed the complaint. The demand should also cover all documents justifying a claim that anti-commandeering case law should be ignored or overturned, and documents related to that determination.

This demand will set up a possible counterclaim for abuse of process as well as sanctions under Rule 11.

Example: Birthright Citizenship cases

Trump's executive order on birthright citizenship is at stake in several pending

cases. Judge Sorokin of the District of Massachusetts issued a preliminary injunction against implementation of the EO in a 31 page opinion. Here's footnote 8:

In fact, the defendants' discussion of *Texas* in their papers verges on misleading. The language upon which they most heavily rely appears in a footnote quoted in their opposition memorandum and referenced during the motion hearing. Contrary to the defendants' characterization, that footnote is not a "holding," and it does not "foreclose[]" the State plaintiffs' standing in this case. *Id.* Rather, it acknowledges that "States sometimes have standing to sue . . . an executive agency or officer," and though it warns that "standing can become more attenuated" when based on "indirect effects" of federal action, it stops short of saying such effects could never satisfy Article III. *Id.* This case, in any event, concerns direct effects. Cites omitted.

That doesn't verge on misleading, it's misleading, and required the parties and the Courts to expend time and energy unraveling it.

The Judge also calls out the government's argument that birthright citizenship requires "mutual consent between person and polity". The child, of course, can't consent so that falls to the parents. The government says that if the parents are here illegally, the polity, the US, did not consent to citizenship.

Judge Sorokin rejects that argument, saying[that birthright citizenship is granted to the child. The parents are not involved. Second, all of the parents of enslaved people were here under duress, not by consent. Therefore the argument means the 14th Amendment doesn't apply to children of slaves. The Court says this argument "verges on frivolous." I'd say it crosses the frivolous line into stupid.

Both the state and private plaintiffs should move for sanctions under Rule 11. On its own, the Court should require all the lawyers who signed the pleading to attend three hours of ethics training and certify their attendance within 60 days.

One more example.

Out-of-state lawyers are usually required to apply for and receive permission to appear pro hac vice. Most right-wing litigation groups, like Americans Defending Freedom, use out-of-state lawyers. If sanctions are appropriate under Rule 11, there is nothing to prevent the court from imposing as a sanction termination of pro hac admission. Admission pro hac in future cases will set up the possibility of moving to deny or revoke admission on the grounds that the lawyer has been revoked in one court. That will certainly deter garbage filings.

Conclusion

I know courts are reluctant to award sanctions. But this administration is abusing the courts, just as Trump has done all his life. If courts refuse to protect themselves, and refuse to fully protect the people damaged by illegal actions, their already trashed reputation will sink into negative territory.

I also know that lawyers don't like to ask for sanctions. It's an unwritten rule tied to notions of collegiality. I know it's particularly difficult with government lawyers, because of the risk they'll appear in another case where your clients might be hurt.

But. Adhering to unwritten rules has led to this: Trump walks free, free to abuse the courts, free to wreak vengeance, free to wreck what it took centuries to build. Fixing this is more important than fake gentility.